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Supreme Court, U.S.
FILED
JUL 19 2001
CLERK

No. 00-1689

IN THE

Supreme Court of the United States

AT&T COMMUNICATIONS OF THE SOUTHWEST, INC.
Petitioner,

v.

SOUTHWESTERN BELL TELEPHONE COMPANY, *ET AL.*
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE MISSOURI PUBLIC SERVICE COMMISSION IN SUPPORT OF PETITIONER

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096_ – WASHINGTON, D. C. 20001

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ARGUMENT

AT&T Communications of the Southwest, Inc. ("AT&T") has requested a writ of certiorari in the above proceeding ("AT&T Petition for Writ of Certiorari") to seek review of the U.S. Court of Appeals for the Eighth Circuit's ("Eighth Circuit") decision revoking the FCC's TELRIC pricing rule.[1] AT&T has asked this Court to hold its writ until it makes a ruling in *Iowa Utils. Bd. v. FCC*, 219 F.3d 744 (8th Cir. 2000) (*"Iowa Utilities II"*). AT&T ultimately hopes that this Court will find in AT&T's favor in *Iowa Utilities II*,[2] by validating the FCC's rule on total element long-run incremental cost ("TELRIC") pricing. Such a result would enable this Court to grant AT&T's petition for writ of certiorari and to order a vacatur of the Eighth Circuit's decision below.

AT&T, in requesting that this Court hold its certiorari petition until it has rendered its decision in *Iowa Utilities II*, argues that if this Court overturns the Eighth Circuit's decision in *Iowa Utilities II*, which invalidated 47 C.F.R. § 51.505(b)(1), "vacatur of the decision in this case will be appropriate and necessary to allow the Eighth Circuit to reconsider its decision in light of the Court's decision."[3] The Missouri Public Service Commission ("Missouri Commission") agrees with AT&T that this Court's ruling in *Iowa Utilities II* may affect the basis of the Eighth Circuit's holding below.

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[1] *AT&T Communications of the Southwest, Inc. v. Southwestern Bell Telephone Company, et al.*, 236 F.3d 922 (8th Cir. 2001), *aff'd in part, rev'd in part, and remanded in part*, 86 F. Supp. 2d 932 (W.D. Mo. 1999).

[2] The court accepted writs in five cases, including *"Iowa Utilities II,"* which were consolidated into *Verizon Communications Inc., et al. v. FCC*, 531 U.S. __ (Jan. 22, 2001) (No. 00-511).

[3] AT&T Petition for Writ of Certiorari at page 5.

Initially, the Missouri Commission waived a response to AT&T's petition. The Missouri Commission did so because it generally believes that it is not necessary for this Court to affirmatively vacate the Eighth Circuit's holding consistent with its decision in *Iowa Utilities II*. If this Court were to uphold the FCC's TELRIC pricing rule in *Iowa Utilities II*, the Eighth Circuit would, *sua sponte*, reconsider its stayed decision in light of this Court's opinion. Upon reconsideration of the issue, the Missouri Commission now supports AT&T's petition.

Although the Eighth Circuit would likely reconsider its decision, *sua sponte*, if *Iowa Utilities II* is overturned, the process for reconsideration of the decision is not well defined. There is no rule of federal appellate procedure or local Eighth Circuit rule that allows the *parties* to ask the Eighth Circuit directly to vacate its prior opinion consistent with new precedent. Thus, the parties are subject to the unfettered discretion of the Eighth Circuit as to when, and in what exact way, it would address this Court's ruling. If this Court were to order the vacatur of the Eighth Circuit opinion in *Iowa Utilities II* and to remand this case for findings not inconsistent with this Court's *Iowa Utilities II* opinion, it would ensure a more certain and expeditious resolution in the Eighth Circuit.

CONCLUSION

For the foregoing reasons, the Missouri Public Service Commission supports AT&T in its petition for writ of certiorari in the instant case and urges this Court to grant the petition.

Respectfully submitted,

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July 19, 2001